

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0150
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
WILLIAM DENNIS LEE,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200601331

Honorable Boyd T. Johnson, Judge

AFFIRMED

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ESPINOSA, Judge.

¶1 Following a jury trial, William Lee was convicted of negligent homicide and sentenced to six years' imprisonment. On appeal, he contends the trial court erred in admitting evidence of prior acts and that prosecutorial misconduct denied him a fair trial. We affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdict. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In 2006, Lee was employed as a security guard at a mine in Florence when he shot at close range and killed a trespasser, D., who was riding an all-terrain vehicle (ATV). Lee claimed the shooting was an accident. Over Lee's objection, pursuant to Rule 404(b), Ariz. R. Evid., the trial court allowed the state to present the testimony of other trespassers at whom Lee had also shot, to establish the shooting was not accidental. The jury found Lee not guilty of manslaughter but guilty of the lesser-included offense of negligent homicide, and this appeal followed.

Discussion

Prior Acts Evidence

¶3 Lee first argues the trial court erred "in admitting evidence of other bad acts," arguing that evidence he had threatened other trespassers was irrelevant, unduly prejudicial, and used improperly, and that the court applied the wrong legal standard in admitting it. "We review the admission of evidence pursuant to Rule 404(b) for an abuse of discretion." *State v. Williams*, 209 Ariz. 228, ¶ 13, 99 P.3d 43, 47 (App. 2004). If evidence of other acts is

relevant and tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, it may be admissible. *Id.*; *see* Ariz. R. Evid. 404(b).

Relevance

¶4 The court allowed the state to present testimony from other ATV riders at whom Lee had fired shots when they were on mine property to show D.’s shooting was not an accident. On one occasion, Lee had fired five shots at a pair of riders, one of whom testified he knew the shots came “real close” to his head because he could hear the bullets “whizzing past [his] ears.” On another occasion, Lee had approached a pair of riders, threatened to kill them, and shot at them as they drove away. When those riders looked back, they saw Lee pointing a shotgun at them “[i]n a shooting position.”

¶5 Lee argues this evidence is irrelevant because, under A.R.S. § 13-407, he was “justified in threatening deadly physical force” against the other trespassers and the evidence only shows he “made a habit of pointing loaded guns at trespassers and firing into the air as they fled.” He claims “[p]roof that [he] intended to scare other trespassers by discharging a weapon into the air or ground is not evidence that he intentionally shot [D.] in the chest at close range.”

¶6 Lee’s characterization of the prior encounters is not supported by the record and his arguments are without merit. While he correctly notes § 13-407 recognizes as justified the threat of deadly physical force—but not its actual use—in defense of property, Lee is incorrect that the prior incidents were mere threats. Deadly physical force is “force

that is used with the purpose of causing death or serious physical injury or in the manner of its use or intended use *is capable of creating a substantial risk of causing death or serious physical injury.*” A.R.S. § 13-105(14) (emphasis added). The record undercuts Lee’s claim that he fired guns into the air merely in an attempt to “frighten” trespassers. Rather, the testimony reflects that on prior occasions he had aimed at trespassers and had nearly hit one in the head. Aiming and shooting a gun at a person is conduct “capable of creating a substantial risk of causing death or serious physical injury,” regardless of whether the bullets actually hit anyone. *Id.*; *cf. State v. Wood*, 180 Ariz. 53, 69, 881 P.2d 1158, 1174 (1994) (person at “grave risk of death” when “directly in the line of fire”); *State v. Nash*, 143 Ariz. 392, 404-05, 694 P.2d 222, 234-35 (1985) (witness at “grave risk of death” when she escaped injury by crawling under desk during shooting).

¶7 Accordingly, the testimony of Lee’s other victims established that Lee had not merely exercised his statutory right to threaten force, but had actually employed deadly physical force without justification. Lee was charged with manslaughter by recklessly causing the victim’s death, *see* A.R.S. § 13-1103(A), and the state was required to prove he “consciously disregard[ed] a substantial and unjustifiable risk that the result [would] occur.” § 13-105(10)(c). Evidence that he had similarly used deadly force against other trespassers unlawfully was highly probative to show D.’s death was not an accident but, rather, the result of Lee’s conscious disregard of the substantial risk of death caused by shooting guns at people. *See* § 13-105(10)(c); Ariz. R. Evid. 404(b); *Lee v. Hodge*, 180 Ariz. 97, 101, 882 P.2d 408, 412 (1994) (evidence repair shop intentionally damaged other customers’ cars

admissible to show damage to plaintiff's car was fraudulent, not accidental); *State v. Smith*, 130 Ariz. 74, 76, 634 P.2d 1, 3 (App. 1981) (evidence of prior removal of children admissible to show child abuse reckless and not result of mistake or accident); *see also Harapat v. State*, 174 P.3d 249, 251-52 (Alaska Ct. App. 2007) (evidence defendant played with weapons and pointed them at others relevant to show shooting death reckless, not accidental).

Prejudice

¶8 Lee further argues the other-act evidence should not have been admitted because of the risk it would be used for an improper purpose, which, he claims, the prosecutor actually did. He maintains, as he did below, that evidence he had shot at other trespassers only paints him as a violent person who routinely violates the norms of society and capitalizes on the sentiment that § 13-407 is “a relic of the western frontier with no place in our current urbanized society.” A trial court, however, has broad discretion in weighing the probative value of evidence against its prejudicial effect and, absent a clear error, we will uphold its ruling. *State v. Salazar*, 181 Ariz. 87, 91, 887 P.2d 617, 621 (App. 1994).

¶9 Lee raised the above points in both his written motion and his oral argument on the motion before the trial court. In its ruling, the court acknowledged the potential for prejudice, reiterated the proper use of this evidence, and offered to give a cautionary jury instruction to prevent any improper use. The court expressly weighed the probative value versus prejudicial effect of this evidence, articulating that it was relevant to show absence of accident or mistake and clarifying that the state could use it solely for this limited purpose.

Given the trial court's due consideration of Lee's arguments and recognition of and safeguarding against the danger of prejudice, we cannot say it clearly abused its discretion in admitting the evidence. *Cf. State v. Schurz*, 176 Ariz. 46, 51-52, 859 P.2d 156, 161-62 (1993) (prejudicial impact of evidence defendant subsequently robbed and attempted to burn another victim did not outweigh probative value in establishing identity and rebutting defense that defendant too intoxicated to comprehend actions when he burned murder victim); *State v. Williams*, 209 Ariz. 228, ¶ 23, 99 P.3d 43, 49 (App. 2004) (testimony regarding sexual acts against prior victims not unduly prejudicial when used to rebut defense that third party committed offense).

¶10 Lee further argues the danger this evidence would be used was not theoretical, as the prosecutor actually did use it for an improper purpose. He points to the state's closing argument in which he alleges, the prosecutor referred to evidence of Lee's prior acts to impugn his character and suggest he has a propensity for violence. But we need not dwell on this argument because, as the state points out, Lee failed to raise any objection to the remarks at trial.¹ *See State v. Connor*, 215 Ariz. 553, ¶ 35, 161 P.3d 596, 606 (App. 2007) (absent fundamental error, failure to object to misuse of evidence admitted for limited

¹At the close of evidence, before closing arguments, Lee moved for a mistrial, arguing the state had improperly used the prior-acts evidence during its case. He contends this motion was a proper objection to the prosecutor's subsequent statements in closing and preserved this argument for appeal. However, as the record shows, he requested the mistrial before the statements he now claims are objectionable. Objections are intended to bring impropriety to the court's attention and afford it an opportunity to remedy errors. *See State v. Goldsmith*, 112 Ariz. 399, 401, 542 P.2d 1098, 1100 (1975). Because Lee did not alert the trial court at the appropriate time, it was unable to determine whether the statements were improper and take any necessary corrective steps.

purpose constitutes waiver on appeal). Lee has also not requested fundamental error review and, therefore, has waived any such review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued).

Legal Standard Applied

¶11 Lee next contends the trial court applied an incorrect standard in admitting the evidence of prior acts. He maintains the court erred by “adopt[ing] the [s]tate’s theory” that the legally justifiable act of “intentionally discharging . . . weapons in the presence of trespassers [was] relevant” to prove D.’s shooting was not accidental. But, as articulated above, aiming toward and shooting at trespassers exceeds the scope of § 13-407 because it is actual deadly force; thus, that conduct was highly relevant, admissible evidence of Lee’s recklessness. We reject Lee’s argument that the trial court “fail[ed] to distinguish between the use of the evidence as proof of character and its use for a lawful purpose,” as lacking merit.

¶12 To the extent Lee argues the trial court “ignored” its obligation under Rule 403, Ariz. R. Evid., to analyze and exclude evidence that was likely to be used for an improper purpose, his complaint is similarly meritless and unsupported by the record. At the pretrial hearing on Lee’s motion to preclude, the court heard and considered Lee’s arguments that the evidence would be used for an improper purpose, and it conducted its analysis on the record, specifically considering both the probative value of the evidence and its prejudicial

effect. Again, we will not disturb the trial court's ruling absent a clear abuse of discretion. *See Salazar*, 181 Ariz. at 91, 887 P.2d at 621.

¶13 Moreover, it is notable the jury found Lee guilty of criminally negligent homicide rather than manslaughter. Therefore, even were we to find the evidence of Lee's prior acts was improperly admitted, the jury's rejection of the state's recklessness theory indicates the evidence had no effect on its verdict. Consequently, any error resulting from its admission was harmless. *See State v. Anthony*, 218 Ariz. 439, ¶ 39, 189 P.3d 366, 373 (2008) (error deemed harmless when guilty verdict unattributable to error).

Prosecutorial Misconduct

¶14 Finally, Lee argues the prosecutor committed misconduct by misstating the law and claims the trial court's curative instruction was insufficient to ensure a fair trial. We will not disturb a trial court's denial of a motion for mistrial on the basis of prosecutorial misconduct absent a clear abuse of discretion. *State v. Sarullo*, 219 Ariz. 431, ¶ 23, 199 P.3d 686, 692 (App. 2008). To warrant reversal, the misconduct must "affect the jury's ability to fairly assess the evidence and be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.*, quoting *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 23, 42 P.3d 1177, 1183-84 (App. 2002). Although it is improper for an attorney to misstate the law to the jury, such misstatements do not necessarily require reversal. *State v. Means*, 115 Ariz. 502, 505, 566 P.2d 303, 306 (1977).

¶15 During the state's rebuttal argument, the prosecutor told the jury Lee had misstated the law when, in closing, defense counsel had said, "If the use [of a gun] is

authorized by law[,] accidental discharge is not a crime.” The prosecutor pointed out that the words “accident” and “unintentional use” were not part of the applicable law or the court’s instructions to the jury. Lee objected, arguing the prosecutor had improperly implied that accidental shooting was not a defense under any circumstances. The court agreed that, to the extent the prosecutor had suggested an accident could never be a full defense, it was a misstatement of the law. The court thus instructed the prosecutor to “make it clear that accident does . . . excuse him if the jury determines the gun was used lawfully.” Lee then requested a particular jury instruction, which the court declined to give, and Lee moved for a mistrial. Instead of granting a mistrial, the court addressed the jury, saying, “I will instruct you that . . . the words [‘]accidental[’] or [‘]unintentional[’] do not appear in this particular set of statute[s]. If you believe justification applies and if you believe the gun discharged accidentally[,] then there’s no criminal liability that attaches to the defendant.”

¶16 Lee maintains the court’s curative instruction was inadequate because it failed to correct the prosecutor’s additional statement that “justification did not apply when a person has been killed.” He argues the trial court “merely t[old] the jury what to do if it f[ound] that justification d[id] apply[;] it d[id] not correct the prosecutor’s argument that justification cannot apply.” But the record does not substantiate Lee’s contention: it reflects no argument by the prosecutor that justification could not apply if a person has been killed. Furthermore, the jury was properly instructed that the threat of deadly force is justified to thwart a criminal trespass, *see* § 13-407, and the court’s additional instruction made clear an accidental shooting that occurs when a threat of deadly force is justified does not give rise

to criminal liability. *See Mayweather v. State*, 29 Ariz. 460, 462, 242 P. 864, 865 (1926) (trial court correctly instructed jury that defendant could not be guilty of murder if justifiably shot at one, but accidentally hit another); *cf.* A.R.S. § 13-401(A) (justification defense unavailable when defendant is reckless). Lee nonetheless asserts the court’s oral instruction “permitted [the jury] to ignore the lawfulness of the use of the weapon and focus on its production instead of the reasonableness of the manner in which it was used.” To the extent we understand this argument, we fail to see how the asserted inference would flow from the court’s allegedly inadequate correction of a statement the record does not reflect the prosecutor made. Accordingly, we see no error in the court’s efforts to correct any misstatements of the law.

¶17 Furthermore, even had the court’s instruction been erroneous, the error would have been harmless because, as Lee concedes, “the lesser included [negligent homicide] verdict suggests that the jury may have resolved this issue properly.” To the extent Lee suggests his conviction of negligent homicide was evidence of a “compromise[.]” verdict, we cannot speculate on the thoughts of the jury in the absence of anything in the record to establish this was the case. *See State v. Bible*, 175 Ariz. 549, 568, 858 P.2d 1152, 1171 (1993) (absent record showing what jurors may have understood, no presumption defendant denied fair trial). The court’s instruction clearly remedied any misstatement of the law in the state’s closing arguments. Therefore, there was no prejudice, *see Means*, 115 Ariz. at 505, 566 P.2d at 306, and the alleged misconduct did not permeate the trial or otherwise affect the jury’s ability to fairly assess the evidence, *see Sarullo*, 219 Ariz. 431, ¶ 23, 199 P.3d at 692.

Disposition

¶18 For the reasons outlined above, Lee's conviction is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge